

IN THE SUPREME OF TENNESSEE

AT NASHVILLE

FILED

January 24, 2000

No. Below 96-1147

Cecil Crowson, Jr.

Appellate Court Clerk

Hon. James O. Bond

GARY WAYNE DAVIS

}

WILSON CIRCUM

}

No. Below 96-1147

Plaintiff/Appellee

}

Hon. James O. Bond

vs.

}

}

No. M1998-00506-WC-R3-CV

SUMNER COUNTY BOARD OF
EDUCATION, GALLATIN, TN

}

}

Defendant/Appellant

}

Modified and Remanded

JUDGMENT ORDER

This case is before the Court upon the entire record, including the order of referral to the Special Workers' Compensation Appeals Panel, and the Panel's Memorandum Opinion setting forth its findings of fact and conclusions of law, which are incorporated herein by reference.

Whereupon, it appears to the Court that the Memorandum Opinion of the Panel should be accepted and approved; and

It is, therefore, ordered that the Panel's findings of fact and conclusions of law are adopted and affirmed, and the decision of the Panel is made the judgment of the Court.

Costs will be paid by taxed equally to the parties, for which execution may issue if necessary.

IT IS SO ORDERED on January 24, 2000.

PER CURIAM

**IN THE SUPREME COURT FOR TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE**

GARY WAYNE DAVIS,
Plaintiff/Appellee

vs.

**SUMNER COUNTY BOARD OF
EDUCATION, GALLATIN, TENNESSEE,**
Defendant/Appellant.

) **APPEAL NO.**
) **M1998-00506-WC-R3-CV**
)
) **WILSON CIRCUIT**
) **NO. 96-1147**
)

<p>FILED</p> <p>January 24, 2000</p> <p>Cecil Crowson, Jr. Appellate Court Clerk</p>
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FOR THE APPELLEE:
FOR THE APPELLANT:
JERE McCULLOCH, Esquire
Esquire
109 Castle Heights Avenue North
Lebanon, Tennessee 37087

JAMES C. BRADSHAW, III,
Suite 1500, 511 Union Street
Nashville, Tennessee 37219-1750

MEMORANDUM OPINION

MEMBERS OF PANEL:

ADOLPHO A. BIRCH, JR., JUSTICE
LLOYD TATUM, SENIOR JUDGE
CAROL L. MCCOY, SPECIAL JUDGE

OPINION FILED: MODIFIED AND REMANDED

CAROL L. MCCOY
Special Judge

MEMORANDUM OPINION

This workers' compensation appeal has been referred to the Special Workers Compensation Appeals Panel of the Supreme Court pursuant to T.C.A. § 50-6-225(e)(3) for hearing and reporting of findings of fact and conclusions of law. The employer, Sumner County Board of Education (Sumner County), has appealed from the trial court's finding that the employee, Gary Wayne Davis (Davis), was entitled to a 92.5% disability as a result of a job related fall.

Appellate review is *de novo* upon the record of the trial court accompanied by a presumption of correctness of the findings of fact, unless the preponderance of the evidence is otherwise. T.C.A. § 50-6-225(e). To satisfy this standard of review, this Court must conduct an independent examination to determine where the preponderance of the evidence lies. Williams v. Tecumseh Products Co., 978 S.W.2d 932, 935 (Tenn. 1998).

Appellee Davis taught physical education and driver's education for Sumner County when he fell off a desk on January 10, 1994 injuring his back. He was seen after the accident by Dr. Clayton MacConnell who prescribed some non-steroidal anti-inflammatory medicine, some pain medication and ordered a CAT scan. The scan showed mild bulging of the disc but no actual rupture. Dr. MacConnell referred him to Dr. Vern Allen in May of 1994 for an evaluation of his back injury. At the time of the evaluation, David was taking outpatient physical therapy. He reported low back pain, some numbness in the left leg and radicular right leg pain. Dr. Allen recommended that he continue the physical therapy and prescribed Robaxin. Davis' condition did not improve, and Dr. Allen examined him again in October. No treatment other than home exercises was prescribed.

In September of 1995, Dr. Allen referred Davis to Dr. Leon Ensalada for further evaluation and management of Davis' back and right leg pain. Dr. Ensalada prescribed steroid injections at the L-5/S-1 level which, when Davis went back to Dr. Ensalada on October 11, 1995, had alleviated most of the pain. On November 14, 1995, Dr. Ensalada found Davis had reached maximum medical improvement, and stated that he had a 5% whole person impairment, that there were certain restrictions that he was subject to, but that he was able to return to his

job as a teacher.

Unfortunately, Davis' condition deteriorated. When he visited Dr. John Campa in August of 1996, he was experiencing left knee pain, low back pain, right lower extremity pain, neck and head pain, left elbow and bilateral thumb pain. The painful knee, back and neck conditions each had a previous history.

Davis' knee problem began after a sports related injury in 1962. He had cartilage repair knee surgery in 1963 and 1964. In 1990, the knee was further injured when he jumped off a set of old bleachers at work as they were giving way and suffered a twisting knee injury. In 1993, the knee was again operated on. However, the knee continued to be painful with decreased stability.

Davis' low back problems began in 1976 when he was rear-ended while riding a motorcycle. At that time, Dr. Lloyd Walwyn diagnosed Davis with several disc bulges and soft-tissue lumber strain. Dr. Campa's August 1996 Report stated that the accident for which Davis now seeks compensation further exacerbated his low back condition. Dr. Campa also stated in his Report that Davis' back was again injured after the accident at issue when he bent over to lift a television set while he was on vacation resulting in a soft-tissue injury that was treated with steroid injections.

Davis' neck problems started with the 1976 motorcycle accident when he suffered a whiplash injury. Davis had been having headaches for the last 15 years. These headaches were diagnosed as vascular/migraine and cluster type headaches resulting in nausea, vomiting, photophobia and irritability. Dr. Campa noted in his August 1996 Report that Davis complained that his pain was constant, aching and sharp, in his back, left knee, hands and shoulders; that it was aggravated by prolonged sitting, standing, stooping, bending, lying, walking, climbing, cold weather, driving or riding in vehicles, lifting, vacuuming, carrying and pulling. Davis was taking numerous pain medications, including three to four Darvocet per day and Percocet as needed. He also received Demerol injections when the pain was severe. Dr. Campa ordered numerous medical tests and a functional capacity evaluation with the goal of determining Davis' impairment rating. At Dr. Campa's deposition on October 9, 1997, he testified that Davis would be subject to permanent restrictions in any job he performed, that Davis

could exert up to 20 pounds of force occasionally, up to 10 pounds of force frequently and a negligible amount of force constantly. He stated that Davis could work in the light work physical demand category and that he would require ongoing care for his spine problems.

Dr. Campa gave Davis a 47% whole person impairment rating, but admitted he had not apportioned the amount of this impairment that was related to Davis' 1994 work injury. On July 24, 1998, the parties filed a stipulation that Dr. Campa's deposition testimony would be amended in accordance with a November 24, 1997 Report in which Dr. Campa gave Davis an adjusted whole person impairment rating of 37%. The parties disagree as to the extent of this 37% that Dr. Campa attributes to the 1994 accident at issue. Sumner County asserts that Dr. Campa has given Davis a 25% impairment rate for the 1994 accident. Davis asserts the entire 37% is caused by the 1994 accident. While the November 24, 1997 Report issued by Dr. Campa is not crystal clear, it appears that Dr. Campa has included in his impairment rating injuries from Davis' 1990 bleacher injury, which would not be recoverable in this action.

The trial of this matter was held on July 27, 1998. Davis is 51 years old, holds a bachelor of science degree in health and physical education, with a minor in biology and aerospace. He had worked in production at AVCO, as an orderly at a hospital, building houses, and with the Sumner County Schools for 18 years. Davis had also worked in security, taught some classes in motorcycle safety, and been a barber for several years. After his injury in 1994 through June of 1995, Davis continued to work as a physical education teacher. He stated that his back gradually got worse. He quit work in June of 1995 at the suggestion of Dr. Elrod who was treating him for his knee problems. Dr. Elrod said he should quit work or have his knee replaced. Davis also testified that his other aches and pains contributed to his decision to quit work.

Mr. Ronnie Yates, a teaching colleague of Davis and a teacher for 29 years, testified that after Davis fell, Davis was not able to perform some of the functions of a physical education teacher. Yates had to help him with his classes due to Davis' inability to do any heavy lifting or pulling. Davis had never complained of back pain before the accident and it was obvious to Yates that

Davis was in pain after the accident. Yates described the various activities a physical education teacher has to perform, and stated that, based on his knowledge of the various physical requirements of the job, Davis was unable to perform this job anymore.

Linda Davis, Davis' wife, testified that Davis's life has changed substantially since the accident. She said Davis cannot sit for long periods of time, has difficulty sleeping and is not able to do yard work. She also stated he cannot stand for prolonged periods of time, but she doesn't know if that is due to his back or knee. She has been a teacher for 25 years and married to Davis for most of that time. Based on her knowledge of the many duties a teacher has to perform and her husband's medical problems, she did not think he can perform these duties, which include crowd control, lunch room duty and bus duty. There was no expert vocational testimony introduced by either side.

The trial court found that Dr. Campa's testimony regarding Davis' impairment rating was more credible than Dr. Ensalada's. The trial court noted that Davis had only requested an award of 75% to the body, but based upon the 37% to the body as a whole impairment rating, the court awarded Davis 92.5% to the body as a whole disability rating.

While the trial court's determination of the credibility of live witnesses and the weight to be given their testimony will be accorded great deference by this Court, this standard does not apply to physician experts who testify by deposition. The Court may draw its own conclusions about the weight and credibility of such experts as it is in the same position to evaluate deposition testimony as the trial court. McIlvain v. Russell Stover Candies, Inc., 996 S.W.2d 179 (Tenn. 1999). The physicians in this action testified by deposition or a stipulation to their medical reports.

Davis continued to work at the teaching job for 1½ years after the 1994 accident. Although Davis is not working now, Davis testified the main reason he quit teaching was his knee problems for which he had received surgery as late as 1993. In addition, Dr. Campa assigned Davis a 37% anatomical impairment rating, basing 46% of this rating on the 1990 bleacher accident - an accident that is not at issue in this case. The Court finds that in light of Davis'

level of education, his job skills, Dr. Ensalada's finding that he could return to work and even Dr. Campa's finding that he could return to work with some physical restriction, the weight of the evidence preponderates against the trial court's vocational disability award of 92.5% to the body as a whole. After an independent review of the entire record, the Court finds that Davis is entitled to a vocational disability of 60% to the body as a whole.

Accordingly, the trial court's decision is modified and this matter is remanded to the trial court for proceedings consistent with this opinion. Costs of this matter are taxed equally to the parties.

It is so ORDERED.

Carol L. McCoy, Special Judge

CONCUR:

Adolpho A. Birch, Associate Justice

Lloyd Tatum, Senior Judge